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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 418

Civil

CHESTER PARK APARTMENTS, INC.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above case on May 28, 1964.

I

OPINIONS BELOW

The opinion of trial court has not been published in official reports, but may be found in Appendix A attached hereto. The opinion of the Court of Appeals for the Eighth Circuit is reported at 332 F. 2d 1; and is appended hereto in Appendix B.

II

JURISDICTION

The judgment of the Eighth Circuit Court of Appeals was made and entered on May 28, 1964, and a copy thereof is appended to this petition as Appendix C. A petition for rehearing was denied by the Eighth Circuit Court of Appeals on June 23, 1964.

The jurisdiction of this Court is invoked under Title 28, U.S.C. §1254(1).

III

QUESTIONS PRESENTED FOR REVIEW

This is an action to foreclose a mortgage upon *Minnesota real estate* consisting of an apartment house complex.

The mortgage was given by a *Minnesota corporation* to a New York corporation.

It was recorded in the Office of the Register of Deeds in and for Ramsey County, *Minnesota*, in accordance with the provisions of *Minnesota law* authorizing such recording.

The personalty was covered by the chattel mortgage given by the *Minnesota corporation* to the New York corporation.

The chattel mortgage was recorded in the Office of the Register of Deeds of Ramsey County, *Minnesota*, in purported compliance with *Minnesota law*.

Two modification agreements were executed by the parties and recorded with the Register of Deeds of Ramsey County in accordance with *Minnesota law*.

The assignment of the mortgage to the Federal Housing Administrator was recorded in the Office of the Register of Deeds of Ramsey County, *Minnesota*, in accordance with *Minnesota law*.

The complaint alleges (par. 12) that the Federal Housing Commissioner has a lien prior and superior to any other claims against the property described in the mortgage, thereby referring to, and necessarily relying upon, the authority of *Minnesota law* in accordance with the pronouncements of this Court in *United States v. Brosnan*, 363 U.S. 237 (1960), and in *Meyer v. United States*, 84 S. Ct. 318 (1963).

The plaintiff applied for the appointment of a receiver. The case presented to the trial court disclosed:

(a) The mortgage had not been foreclosed.

(b) No accounting had ever been furnished to the mortgagor by respondent, showing the amount of claimed default, nor application of funds paid by Chester Park.

(c) There was no evidence of the amount of the reserve for replacement.

(d) There was no evidence indicating:*

(i) Inadequacy of security;

(ii) Waste;

(iii) Insolvency or other jeopardy to respondent's interest;

(iv) Level of occupancy, vacancy, income, rental rates or profits; or

(v) The condition of repair.

[Petitioner was at all times prepared to offer evidence to show that there was in fact no inadequacy of security, waste or insolvency, and that the property was in excellent repair and nearly fully occupied.]

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*Certain of these deficiencies were attempted to be supplied by the affidavit of Patrick J. Foley, included in the record presented to the Court of Appeals. All were flatly contradicted by the counter affidavit contained in the trial court's file, excluded from the record presented to the Court of Appeals, set out in Chester Park's brief there, and reproduced as Appendix D.

It has at all times been conceded by respondent that Minnesota law would prohibit the appointment of a receiver in this case.

On the basis of the foregoing, the District Court denied the application. The Eighth Circuit reversed and ordered the appointment of a receiver "forthwith."

This case presents the single question: May the Court, pending a mortgage foreclosure, appoint a receiver to collect rents and profits of the mortgaged premises in a situation in which:

(i) an FHA insured mortgage between private parties contains a provision authorizing such an appointment upon default;

(ii) such provision is invalid and unenforceable under the law of the situs; and

(iii) there is no showing of waste, inadequacy of security, insolvency of the mortgagor, and no delay existent or prospective in the foreclosure proceedings?

IV

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the federal statute, 12 U.S.C. §1736(a); the Minnesota statute, M.S.A. §559.17; and the FHA regulations, 1949 C.F.R. §§ 280.18, 282.2(c), and 282.8(b), are printed in Appendix E.

The federal statute defines mortgage in terms of the law of the state of the situs of the real estate.

The Minnesota statute by its terms and by judicial construction prohibits the appointment of a receiver pending and after foreclosure, and during the period of redemption.

The governing regulations limit the FHA to relief consistent with local law.

V

STATEMENT OF THE CASE

On July 1, 1950, petitioner executed a mortgage and chattel mortgage in favor of Manufacturers Hanover Trust Company to secure a debt of $1,328,400. The mortgage was insured by the FHA pursuant to Section 608 of the National Housing Act, 12 U.S.C. 1743. On September 18, 1963, the mortgagee assigned the mortgage note and the security instruments to the Federal Housing Commissioner pursuant to Section 608(c), 12 U.S.C. 1743(c). On November 19, 1963, respondent commenced a mortgage foreclosure action on behalf of the Federal Housing Commissioner, invoking the jurisdiction of the District Court pursuant to Title 28 U.S.C. §1345. It was alleged that default had occurred in the terms of the mortgage, and the complaint prayed for foreclosure of the security instruments, sale of the property and the appointment of a receiver to collect rents during the pendency of the foreclosure proceedings.

A separate application for the appointment of a receiver pending the foreclosure proceedings was based upon the following term contained in the mortgage itself:

> "[The mortgagee] shall be entitled to the appointment of a Receiver of the rents and profits of the mortgaged premises as a matter of right and without notice, with power to collect the rents, issues and profits of said mortgaged premises * * * such rents and profits being hereby expressly assigned and pledged as additional security for the payment of the indebtedness secured by this mortgage."

On March 19, 1964, the District Court entered an order refusing to appoint a receiver, and certifying that the question was appropriate for interlocutory appeal. The Eighth Circuit Court of Appeals permitted such an appeal to be prosecuted.

By order of the Court of Appeals, the case was advanced on the calendar and was argued on May 20, 1964. The opinion of the Eighth Circuit was rendered on May 28, 1964, reversing the order of the District Court and ordering the appointment of a receiver "forthwith" with power to collect the rents, issues, and profits of the mortgaged premises.

In reversing the order of the District Court, the Court of Appeals held that federal law governed the enforceability of the FHA insured mortgage. In so doing, the Eighth Circuit expressly stated that the issue before it was "whether federal or state law controls the enforceability of the agreement providing for the appointment of a receiver to collect rents during the pendency of the foreclosure proceedings." The respondent had conceded that under Minnesota law the mortgage provision here in question would be unenforceable.

VI

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals should be reviewed because the decision:

Erroneously construes the applicable federal statute and disregards the controlling regulations;

Creates a conflict between the decisions of the Ninth Circuit* and the decision here sought to be reviewed, on the question whether there must be facts warranting the appointment of a receiver or whether one will be granted on mere application;

Creates a conflict between the decisions of the Ninth Circuit* and the decision here sought to be reviewed, on the one hand, and the decision of the Fourth Circuit;** on the issues of the applicability of federal law and the need for uniformity of application;

By assuming the applicability of a "federal law" where none exists, has decided a federal question in conflict wth applicable decisions of this Court***;

Decided an important question of federal law, i.e., whether the "federal law" is in any way applicable in this matter, in itself an important question of federal law, which has not, but should be, decided by this Court;

Has decided an important question of the law of Minnesota in a way in conflict with Minnesota law, by completely disregarding that law and reaching a result undeniably prohibited under it;

Overrides "concepts of real property [which are] deeply rooted in state traditions, customs, habits and laws" in violation of the relevant principles declared by this Court in *Reconstruction Finance Corporation v. Beaver County*, 328 U.S. 204 (1946);

Erroneously construes this Court's determination in *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943), to mean that wherever there is a federal interest in any degree, governing state law must be disregarded;

On the pretext of providing for uniformity, has in fact created chaos by requiring the application of a non-existent body of federal law;

Has thrust upon the federal courts generally and ultimately cast upon this Court the burden of legislating

*In the cases of *United States v. View Crest Garden Apts., Inc.*, 268 F. 2d 380, *cert. denied*, 361 U.S. 884 (1959), and 281 F. 2d 844, *cert. denied*, 364 U.S. 902 (1960); and *United States v. Queen's Court Apartments, Inc.*, 288 F. 2d 253 and 296 F. 2d 534.

**In *United States v. Union Livestock Sales Co.*, 298 F. 2d 755.

***E.g.: *United States v. Brosnan*, 363 U.S. 237; and *Meyer v. United States*, 84 S. Ct. 318 (1963).

a body of federal mortgage law, where none presently exists; and

Has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervision, in that it has peremptorily reversed the determination of the trial court in a matter which rests exclusively in the sound discretion of that court.

1. The decision erroneously construes the applicable federal statute and disregards the controlling regulations.

The statute, regulations, and mortgage here involved dictate the application of state law.

a) Congress has made no provision for the application of a "federal" law. Rather, the statute itself speaks in terms of state law. The provisions which are applicable to rental housing insurance begin at 12 U.S.C. 1736(a), where it is stated:

> "The term 'mortgage' means a first mortgage on real estate, in fee simple * * * and the term 'first mortgage' means such classes of first liens as are commonly given to secure advances on, or the unpaid purchase price of, real estate, *under the laws of the State in which the real estate is located* * * *." (Emphasis added.)

The Congress has adequately evidenced its intention to make uniform the application of rules in an analogous situation: that of the grain storage program supervised by the Commodity Credit Corporation. The statute, 15 U.S.C.A. 714b(g) states in part:

> "State and local regulatory laws or rules shall not be applicable with respect to contracts or agreements of the Corporation or the parties thereto to the extent that such contracts or agreements provide that

> such laws or rules shall not be applicable, or to the extent that such laws or rules are inconsistent with such contracts or agreements."

Congress has thus amply demonstrated that it knows how to proscribe the application of state law. By 12 U.S.C. 1736(a) it has made it equally clear that it knows there are applicable state laws. Presumably it also knows that they differ from state to state. The initial reference here is made by Congress itself to *state* law. Nothing appears to indicate an intention by Congress to make any other reference, to deny the applicability of state law, or to prescribe the application of a "federal law."

b) The mortgage note makes no reference to any law. The mortgage itself makes various references to the National Housing Act but states on the last page thereof:

> "[T]he Mortgagor hereby authorizes and empowers the Mortgagee to sell the mortgaged premises at public auction and convey the same to the purchaser in fee simple *in accordance with the statutes of Minnesota*, and in any such proceeding the Mortgagor agrees to pay all reasonable charges, including maximum attorney's fees, prescribed by statute. * * *" (Emphasis added.)

c) The Commissioner has issued elaborate regulations governing the insuring function. The relevant provisions provide in part as follows: Section 280.18, "*Rights and remedies of mortgagee in event of default or foreclosure.*"

> "The mortgage must contain a provision or provisions satisfactory to the Commissioner, giving to the mortgagee, in the event of default or foreclosure of the mortgage, such rights and remedies for the protection and preservation of the property covered

by the mortgage and the income therefrom, *as are available under the law or custom of the jurisdiction.*" (Emphasis added.)

See also §282.2(c) which provides in part:

"The term 'mortgage' means such a first lien upon real estate and other property as is commonly given to secure advances (including but not being limited to advances during construction) on, or the unpaid purchase price of, real estate *under the laws of the State, District or Territory in which the real estate is located*, together with the credit instrument or instruments, if any, secured thereby." (Emphasis added.)

Section 282.8(b) provides that the mortgagee shall be entitled to receive the benefits of the insurance if, upon failure by the mortgagor to make payment to the mortgagee or to perform obligations under the mortgage, the mortgagee within a period of 30 days after the occurrence of a default shall give notice in writing to the commissioner of such default. At any time within a period of 90 days after the date of such notice, the mortgagee at its election shall:

"either (1) * * * or (2) institute proceedings for the foreclosure of the mortgage and obtain possession of the mortgaged property and the income therefrom through the voluntary surrender thereof by the mortgagor or institute and prosecute with reasonable diligence, *proceedings for the appointment of a receiver of the mortgaged property and the income therefrom*, or proceed to exercise such other rights and remedies as may be available to it for the protection and preservation of the mortgaged property and the income therefrom *under the mortgage and the law of the particular jurisdiction: Provided*, That *if the laws of the State in which the mortgaged*

property is situated do not permit the institution of such proceedings within such period of time, the mortgagee shall institute such proceedings *within sixty (60) days after the expiration of the time during which the institution of such proceedings is prohibited by such laws.*" (Emphasis added.)

From the foregoing, it clearly appears: Congress has recognized the applicability of state law, and has prescribed none of the aspects of a federal law; rather it has defined mortgage in terms of state law; the Commissioner has consistently recognized, unequivocally, the applicability of state law in every material respect.

The foregoing were before the Court of Appeals; the Court ignored the Congressional language and Commissioner's declarations. It held (without even reference to the Commissioner's clear statement that he was bound by local law) that federal law applies.

2. The decision is in basic conflict with decisions of the Courts of Appeals of the Ninth and Fourth Circuits and in conflict with decisions of this Court.

The decisions of the Ninth Circuit on the same matter are *United States v. View Crest Garden Apartments, Inc.*, 268 F. 2d 380 (1959), 281 F. 2d 844 (1960); and *United States v. Queen's Court Apartments, Inc.*, 288 F. 2d 253, 296 F. 2d 534 (1961).

In each of those cases the critical question was whether, *assuming the applicability of federal law*, the facts warranted the appointment of a receiver. In the first *View Crest* decision, the Court of Appeals remanded the case for findings of fact. The second *View Crest* opinion considered whether the findings were adequate.

Queen's Court was also considered twice. The foreclosure action was tried in the District Court. Part of its decree required the FHA to pay to Queen's Court $27,213.22, constituting a reserve for replacement. After entry of the decree, the FHA moved the trial court for the appointment of a receiver. Before a hearing on the motion, the FHA appealed to have reviewed the portion of the decree requiring its payment to Queen's Court of the $27,213.22.

The District Court denied the appointment of a receiver on the ground that it lost jurisdiction when the appeal was filed.

The FHA moved the Ninth Circuit for appointment of a receiver. The Court noted (288 F. 2d at 254) that the facts warranted the appointment of a receiver [they would have warranted such an appointment under Minnesota law] and remanded with directions to appoint a receiver pending the appeal.

The second decision was devoted to the issue of the $27,213.22. There was raised incidentally the question whether the FHA was entitled to the appointment of a receiver only pending the appeal or during the entire foreclosure period. The Ninth Circuit held that a receiver was proper during the entire period. Although no mention is made of the facts which had been recited in the opinion written six months earlier, it is clear from a reading of both *Queen's Court* decisions that facts such as insolvency, lack of security and waste are required before a receiver will be appointed.

The decision of the Eighth Circuit was based upon the pleadings. No evidence was presented by Respondent indicating inadequacy of security, waste, insolvency of petitioner, low level of occupancy, or disrepair, and no findings on these matters were made by the District Court. Its effect is to say

that mere application for a receiver is all that is required, regardless of the facts. If, as the Eighth and Ninth Circuits have declared, and the FHA has everywhere contended, uniformity is the goal to be achieved, there is a complete lack of uniformity between the treatment to be accorded mortgagors in the Eighth and Ninth Circuits and a clear conflict in the basis for the decisions, which should be resolved by this Court.

If it is be understood from the decisions of the Eighth and Ninth Circuits, collectively, that it is the necessity for uniformity which forms the basis for the application of federal law, those decisions conflict with the policy announced by the Fourth Circuit in *United States v. Union Livestock Sales Co.*, 298 F. 2d 755 (4th Cir. 1962). That case raised the question of liability for conversion of an auctioneer which sold cows covered by chattel mortgages recorded in Ohio in favor of the Farmers Home Administration. The usual arguments about the necessity for uniformity were made. The Court said:

> "We find no need for uniformity in these transactions throughout the United States. On the contrary, it seems to us that the interest of the Government and of the borrower will be properly protected if the local rules governing dealings in the transfer of property, which have been built up by the experience in like transactions and are familiar alike to the courts and the citizens of the several localities, are given application." (298 F. 2d at 759)

There is thus a clear conflict in basic philosophy between the Eighth and Ninth Circuits, on the one hand, and the Fourth Circuit, on the other.

The Fourth Circuit does not assume the answer to the crucial question. Rather, it requires some demonstration that uniformity is necessary even though the United States

is a party to a lawsuit involving "large scale transactions" of the federal government. The Eighth and Ninth Circuits short-cut the process drastically. It is assumed in these Circuits that the existence of a federal program and the presence of the United States in a lawsuit involving that program *ipso facto* dictates the disregard of governing local law and application of some "federal law."

Finally, the decision of the Eighth Circuit is in conflict with and completely disregards the principles enunciated by this Court in a number of cases, including *United States v. Brosnan*, 363 U.S. 237 (1960); *Meyer v. United States*, 84 S. Ct. 318 (1963); and *Reconstruction Finance Corporation v. Beaver County*, 328 U.S. 204 (1946).

The *Meyer* and *Brosnan* cases both declared that questions of property rights should be decided by the applicable state laws. In *Beaver County* this Court stated:

> "Concepts of real property are deeply rooted in state traditions, customs, habits, and laws."

See also *United States v. Brosnan*, 363 U.S. at 241-42:

> "We nevertheless believe it desirable to adopt as federal law state law governing divestiture of federal tax liens, except to the extent that Congress may have entered the field. It is true that such liens form part of the machinery for the collection of federal taxes, the objective of which is 'uniformity, as far as may be.' However, when Congress resorted to the use of liens, it came into *an area of complex property relationships long since settled and regulated by state law*. We believe that, so far as this Court is concerned, the need for uniformity in this instance is outweighed by the severe dislocation to local property relationships which would result from our disregarding state procedures. Long accepted nonjudicial means of enforcing private liens would be embarrassed,

> if not nullified where federal liens are involved, and many titles already secured by such means would be cast in doubt. *We think it more harmonious with the tenets of our federal system and more consistent with what Congress has already done in this area, not to inject ourselves into the network of competing private property interests, by displacing well-established state procedures governing their enforcement, or super-imposing on them a new federal rule.*" (Emphasis added.)

The decision of the Eighth Circuit strikes at the heart of of those concepts. Its disruptive effect should be reviewed by this Court.

3. The decision of the Court of Appeals should be reviewed because it erroneously determined an important question of federal law which has not been, but should be, settled by this Court.

The issue of federal law erroneously decided is the one basic to the controversy: whether the courts should apply existing local law or formulate and then apply a law of their own creation. For want of a better description and because it appears ordinarily to be raised in federal courts, this choice in itself becomes a *federal* question. The issue is important; it should be settled.

Among the propositions which are fairly embraced within it are:

A. The decision should be reviewed because: (a) it has decided an important question of the law of Minnesota in a way in conflict with Minnesota law; and (b) it overrides "concepts of real property deeply rooted in state traditions, customs, habits and laws."

The FHA was not a party to the mortgage. *After its execution*, the mortgage was insured by the Federal Housing Com-

missioner pursuant to the provisions of Section 608 of Title VI of the National Housing Act, as amended (Title 12 U.S.C. 1743).

The mortgage states in part that the holder "shall be entitled to appointment of a receiver of the rents and profits of the mortgaged premises as a matter of right * * * such rents and profits being hereby expressly assigned * * *." Were this a case between the original parties to the mortgage, there is no doubt but that the quoted provision would be invalid and unenforceable. Minnesota Statutes Annotated §559.17 provides:

> "A mortgage of real property is not to be deemed a conveyance, so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure."

The Minnesota Supreme Court has held on numerous occasions that a provision, the enforcement of which results in a partial foreclosure or allows the mortgagee to gain possession of or enjoy the rents and profits from the real estate, is void. See, *e.g.*, *Mutual Benefit Life Insurance Co. v. Canby Investment Co.*, 190 Minn. 144, 251 N.W. 129 (1933):

> "What is now 2 Mason Minn. St. 1927, §9572, providing that a mortgage is not a conveyance so as to entitle the mortgagee to possession without foreclosure, has been held effectually to prevent the mortgagor, at the time of executing the mortgage, from assigning the rents to the mortgagee for the purpose of applying the same against the principal or interest of the mortgage debt. (Citations omitted.) An assignment of rents for the purpose of applying the same to the principal of the mortgage is a partial foreclosure. It is a clear evasion of the fundamental, and now statutorily enacted principle of law that until the mortgage debt is due, until the mortgage has

> been foreclosed and until the period of redemption has run, unless extraordinary circumstances justify the appointment of a receiver, the mortgagor shall be entitled to the possession, enjoyment and full usufruct of the land."

The Minnesota cases make it clear that the policy prohibiting appointment of a receiver is strong, firm, and deeply rooted in the customs and traditions of this state.*

Respondent argued in its reply brief in the Court below that "had Manufacturers brought suit to foreclose the FHA insured mortgage, and moved for the appointment of a receiver pursuant to the express terms of the mortgage, federal law would similarly govern its right to such appointment." No authority has ever been cited for such a proposition.

Respondent has consistently maintained that the mere fact that the mortgage here involved is FHA insured mysteriously removes the rights and remedies from the well established rules of state law into a non-existent field of "federal law of mortgages." Reliance for this proposition stems from *Clearfield Trust Co. v. United States*, 318 U.S. 363, which rejected the application of state law to the commercial transaction there involved. That case does not hold, as respondent contended and the Eighth Circuit assumed, that each and every time the United States is a party to litigation, some existent federal rule must be applied, or formulated and then applied. Rather, the case merely stands for the proposition that *under certain circumstances*, state law must bow to federal law.

The basis for *Clearfield* are adequately clear:

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*A finding of waste is essential to the appointment of a receiver in Minnesota. Mere showing of inadequacy of security or insolvency of the mortgagor, or the combination thereof, will not suffice under Minnesota law.

(1) The application of a "federal" law to the transaction there involved was simply the application of an existent common law merchant. In the instant case, however, the law of mortgages is almost entirely statutory and controlled by the law of the situs.

(2) *Clearfield* involved commercial transactions requiring uniformity to protect the funds of the United States. No such compelling reasons are present here. We are not here dealing with "public monies."

(a) These are public monies only to the extent that they are held by a public agency. They do not constitute contributions or appropriations by the federal government but are made up entirely of premiums paid on insurance policies. Petitioner has contributed in excess of $70,000 to the fund.

(b) According to the 16th Annual Report of the Housing and Home Finance Agency, the insurance program has been an extremely profitable one. The particular insurance fund into which respondent's premiums have been paid is the War Housing Insurance Fund (p. 143). The insurance reserves in that fund increased from December 31, 1960 to June 30, 1962 by $31,000,000 (p. 145). The estimated reserve requirements during the same period decreased from $68,000,000 to $46,000,000, and *the excess of insurance reserve requirements grew from $116,000,000 to $169,000,000* (p. 145). To speak about protection of the public treasury and maintenance of the integrity of the public monies, is at best misleading. This particular aspect of the FHA business is an extremely lucrative insurance business.

(c) The ambulatory characteristics of the commercial paper involved in *Clearfield* may well have required

> the application of a single uniform rule so as to avoid the "vagaries" of state law resulting from the location of the commercial paper at the time of suit. In the present situation, however, the property is fixed in its location so that respondent, at the time it insures a mortgage on the property, may acquaint itself with the law thus involved, and if it is determined to be adverse, may refuse to insure.

The doctrine of *Clearfield* should not be applied here.

B. The decision should be reviewed because it precludes uniformity, and has thrust upon the federal courts the burden of legislating a body of mortgage law.

Consistent with respondent's contentions below, the Court of Appeals decided that "federal law must be applied." It declared:

> "As we recognized in *McCabe*, *supra*, 261 F. 2d 539, the Supreme Court has consistently held that when the Government, acting pursuant to constitutional acts of Congress, enters into *large scale transactions requiring uniform administration*, 'questions of *right and liabilities must be uniformly determined by federal law.*'". (Emphasis supplied.)

This stated premise for the decision begs every question in the case, and the assumptions are wrong.

(1) "*large scale transactions.*" Large is a relative term. By some test, the number and size of mortgages possibly involved may be large. As demonstrated within, FHA's involvement in total mortgage financing is insignificant.

(2) "*requiring uniform administration.*" Uniformity certainly is not necessary merely because respondent says it is. The same cry for uniformity was recently presented in *United*

States v. Union Livestock Sales Co., supra, and usual arguments about the necessity for uniformity were made. The Court said:

> "We find no need for uniformity in these transactions throughout the United States. On the contrary, it seems to us that the interest of the Government and of the borrower will be properly protected if the local rules governing dealings in the transfer of property, which have been built up by the experience in like transactions and are familiar alike to the courts and the citizens of the several localities, are given application." (298 F. 2d at 759.)

The FHA contends that it is engaged in a nationwide insurance business. So are a great variety of banks and insurance companies. Mortgages held by such institutions are governed by the laws of the various states in which the property is situated. Variations in such laws seem not to interfere with the orderly conduct of that business.

It was represented in brief to the Court below that by 1961 *all* FHA insured mortgages outstanding exceeded 6.5 billion dollars in face amount. At the same time, the total private mortgage debt exceeded 200 billion dollars.*

It can safely be assumed that at least the insurance companies insist upon some geographic diversification of mortgage holdings. If we assume that the 200 billion includes FHA insured mortgages, the net of non-FHA insured mortgages exceeded 194 billion dollars in 1961. Mortgagees holding that size investment somehow manage to accommodate themselves to variations in state law.

Uniformity is not a requisite to mortgage investment; it cannot be to mortgage insurance.

Economic Almanac, 1964, National Industrial Conference Board, pp. 172, 459.

Moreover, the claim of 6.5 billion FHA involvement is grossly exaggerated. In 1962, .31 of 1% of Title 608 units were in default, and only .06 of 1% of the units involved were being assigned to FHA.* If the units are roughly proportionate to dollars involved, FHA's concern is really only $3.9 million. If we assume that only 50% of the amount involved is realized in foreclosure, we are dealing with large scale concern of $1.95 million. Such a sum will hardly justify overthrow of the established property laws of the states.

(3) "*rights and liabilities must be uniformly determined by federal law.*" As noted, there is no requirement of uniformity. But that aside, it is clear that chaos, not uniformity, will result from application of federal law. The entire case for the application of a federal law is posited upon *Clearfield*. The Court there set aside the Pennsylvania rules applicable to negotiable instruments. It was immediately able to draw upon an existing body of federal common law merchant, well established in the federal courts prior to *Erie v. Tompkins*. But, to set aside the law of the situs of the land in a mortgage case leaves the court a void to fall back upon.

There is not now nor ever has been a federal law of mortgages. To apply a federal rule, there must be, initially, as many "federal laws" for each mortgage provision as there are federal district judges before whom the various questions arise. This case, so far, presents a single question: the right of the mortgagee to the appointment of a receiver. There are an infinite number of additional problems raising questions such as rights of reinstatement, rights of redemption, times and places of filing, priority over other liens, requirements of mortgage sale, rights of tenants, necessities of

*Housing and Home Financing Agency, op. cit., *supra*.

service and publication of notices of sale and foreclosure—the list is virtually endless.

Without statutory direction each federal district court must, by judicial fiat, carve out a common law of mortgages for its district. The best hope for "uniformity" would be in the adoption of the state rule of each jurisdiction where the case arose, thereby producing exactly the "uniformity" which the commissioner contemplated when he wrote Section 280.18 (Appendix E, *infra*) of his Regulations. Ultimately, uniformity may be produced by this Court.

The problem is among the many aspects of the federal-state controversy noted by Mishkin in *The Variousness of "Federal Law,"* 105 U. Pa. L. Rev. 797 (1957). The author stated at p. 813:

> "Now there are circumstances where the argument for uniformity depends for its cogency upon the probability of actually having a single nation-wide rule. Yet the fact is—presumably well-known to the legal profession—that such complete uniformity may be most unlikely as a matter of common law development: the only court in a position to assure that degree of uniformity—the United States Supreme Court—is so burdened with its present work that it is highly improbable that it could undertake effectively to develop detailed substantive rules for any area we are here considering. Yet the argument for 'uniformity' is made in a wide variety of contexts without any reference to this aspect of reality."

The full impact of the decision of the Court of Appeals is thus to create confusion where certainty now exists unless and until this Court can turn aside from consideration of cases worthy of its attention to legislate a law of mortgages.

I. The decision should be reviewed because the Eighth

Circuit so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervision.

The case was decided upon the pleadings. No facts relating to insolvency, inadequacy of security, or waste appeared. No case was presented to the trial court which had held under any law, state or federal, that a receiver was appropriate even when provided for in the mortgage document. The trial court properly denied the appointment. The appointment (or denial thereof) of a receiver is a matter for the discretion of the trial court.

In the same state of the record the Eighth Circuit reversed. If discretion is involved in the ruling on the propriety of a receiver, it assumes the existence of some operative facts. The Eighth Circuit went beyond any precedent cited to it and has held that facts are not of consequence. A decision so vitally affecting the rights of this litigant and all others similarly situated and so at variance with established precedents should be reviewed by this Court.

CONCLUSION

It is recognized that the function of this petition is to present cogent reasons for review without discussion of the merits of the case. It is doubted whether such complete divorcement is possible. In any event, the following general comment upon the treatment of this case by the Court of Appeals is worthy of this Court's notice at this juncture:

It is not here represented that the case against the appointment of a receiver is so clear as to admit of no doubt. The question of the selection and application of a state or federal rule is an extremely difficult one. See Mishkin, *The Variousness of Federal Law*, 105 U. Pa. L. Rev. 797 (1957). The

complexities of the issue were detailed to the Court of Appeals in a lengthy brief which also raised substantial questions of the practical and legal effect of disregard of state law in a field so historically local as mortgages of real property, treated in detail the regulations which seemed to indicate local law application, examined the validity of the FHA's premises respecting the size of the federal involvement and the need for uniformity, analyzed the inapplicability of decisions of this Court relating to commercial transactions when applied to real property law, examined the scope and nature of the treatment by the courts of equity of the extraordinary and drastic remedies, and documented the existence of other available adequate remedies at law.

After advancement of the case at the request of respondent's counsel to permit argument as the last case of the term, the Court of Appeals issued its decision with great dispatch. On its face the opinion is peremptory.

On a review of the entire case this Court will find that there are serious, difficult questions involved which, because of their impact upon traditional rights and upon important aspects of the state-federal spheres of control, should be considered by this Court.

Respectfully submitted,

D. D. WOZNIAK
Minnesota Building
St. Paul, Minnesota

BRIGGS AND MORGAN
First National Bank
Building
St. Paul, Minnesota
Attorneys for Petitioner

APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Civil Action No. 3-63-341

UNITED STATES OF AMERICA, *Plaintiff*,

vs.

CHESTER PARK APARTMENTS, INC., *Defendant*.

ORDER

The United States of America has filed a complaint alleging that Defendant, Chester Park Apartments, Inc., had executed a mortgage and mortgage note under provisions of the National Housing Act, and insured by the Federal Housing Commissioner. The Plaintiff charges a default in the payments under the note and mortgage and prays for judgment on the defaulted amounts and the entire balance and for an order foreclosing the security and subjecting the property to sale to satisfy the judgment, and for interim relief by way of appointment of a receiver to manage the property and to collect the rents and profits.

A hearing was held on Tuesday, February 25, 1964, on the prayer for interim relief and on an Application for Appointment of a Receiver. The Defendant had filed its Answer specifically and generally denying the fact of default, amount due, necessity and propriety of a receiver, and the standing of Plaintiff. During the hearing, both parties agreed and

stipulated that defendant has failed to make some payments since July 1, 1963 but defendant contends that the amount of default, if any, depends upon the application of the reserve for replacement.

In maintaining that by the terms of the mortgage, the Plaintiff is entitled as a matter of right to a receiver during the pendency of the action to foreclose, the Government cited *United States v. View Crest Garden Apartments, Inc.*, C.A. 9th Cir., 268 F. 2d 380 (1959), and *View Crest Garden Apartments, Inc. v. United States*, C.A. 9th Cir., 281 F. 2d 844 (1960).

The Defendant maintains that State law controls the appointment of a receiver in this action and cites *United States v. Kramel*, C.A. 8th Cir., 234 F. 2d 577 (1956), and *Ethel Meyer, Petitioner v. United States*, 84 S. Ct. 318 (1963). The instant mortgage provides for the receivership and the assignment of rents and profits during foreclosure as additional security. Such a provision is unenforceable under Minnesota law. Inasmuch as in this Circuit it is held that state law must be applied, *United States v. Kramel, supra*, it is obvious that, even though the Defendant is in some default, the Plaintiff is not entitled to a receiver.

Therefore, It Is Ordered, that the Application for Appointment of a Receiver be and hereby is denied.

The Court is of the opinion, however, that this Order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the Order may materially advance the ultimate termination of the litigation. 28 U.S.C.A. 1292(b).

Dated: March 19, 1964.

EARL R. LARSON
Judge
United States District Court

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 17,630

UNITED STATES OF AMERICA, *Appellant,*

vs.

CHESTER PARK APARTMENTS, INC., *Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

[May 28, 1964]

Before VOGEL, MATTHES and RIDGE, Circuit Judges.

MATTHES, Circuit Judge.

The Government instituted an action on November 19, 1963, in the United States District Court, District of Minnesota, for the use, benefit and credit of the Federal Housing Commissioner, seeking certain relief, including the foreclosure of a mortgage on real estate, of a chattel mortgage on personal property, and the appointment of a receiver to take charge and possession of the encumbered property during the pendency of the action. On December 17, 1963, the Government filed an application for appointment of a receiver to take charge of the mortgaged real estate pending the outcome of the foreclosure action. Following a hearing, the court, by order dated March 19, 1964, denied the application for appointment of a receiver. Upon proper certification by the trial

court, and pursuant to 28 U.S.C.A. § 1292(b), we permitted the Government to appeal from this interlocutory order.

The background facts are disclosed by the complaint, exhibits forming a part thereof, and the answer thereto.

On July 1, 1950, Chester Park Apartments, Inc. (appellee) executed its mortgage note in the sum of $1,328,400 payable to Manufacturers Hanover Trust Company of New York, or its order. To secure payment of the note, appellee executed on the same date its mortgage upon real estate in Ramsey County, Minnesota, and as additional security, on March 15, 1952, appellee executed its chattel mortgage on certain personal property. On July 24, 1950, the loan evidenced by the note was insured by the Federal Housing Commissioner pursuant to the provisions of § 608 of Title VI of the National Housing Act as amended, Title 12 U.S.C.A. § 1743.

The complaint alleged and the answer denied that the note and security instruments were in default by reason of the failure of appellee to make installment payment due November 1, 1962, in accordance with the terms of the note; that Manufacturers Hanover Trust Company had exercised its option under the terms of its insurance contract with the Federal Housing Administration, and on September 25, 1963, assigned the note and security instruments to the Federal Housing Commissioner. The complaint further alleged that appellee was indebted to the Government in the following amounts:

> "(a) $1,103,994.80 as the unpaid principal balance due and payable as of November 1, 1963;
>
> "(b) $5,235.48 as unpaid interest on the said principal balance at 4% per annum accrued from the due date of the last payment made to Mortgage principal through October 31, 1963;

"(c) Interest on said principal balance at 4% per annum from November 1, 1963, until paid;

"(d) $3,455.91 as net advances for taxes;

"(e) $5.30 as unpaid interest on the said advances at 4% per annum through October 31, 1963;

"(f) Interest on said advances for taxes from November 1, 1963, until paid.

The Government premised its application for appointment of a receiver upon the mortgage, which provides in pertinent part:

"That the holder of this mortgage, in any action to foreclose, shall be entitled to the appointment of a Receiver of the rents and profits of the mortgaged premises as a matter of right and without notice, with power to collect the rents, issues and profits of said mortgaged premises, due and becoming due during the pendency of such foreclosure suit, such rents and profits being hereby expressly assigned and pledged as additional security for the payment of the indebtedness secured by this mortgage, without regard to the value of the mortgaged premises or the solvency of any person or persons liable for the payment of the mortgage indebtedness. The Mortgagor for itself and any subsequent owner hereby waives any and all defenses to the application for a Receiver as above and hereby specifically consents to such appointment without notice, but nothing herein contained is to be construed to deprive the holder of the mortgage of any other right, remedy or privilege it many now have under the law to have a Receiver appointed. The provision for the appointment of a Receiver of the rents and profits and the assignment of such rents and profits is made an express condition upon which the loan hereby secured is made."

Appellee opposed the granting of interim relief and the appointment of a receiver, persuaded the trial court to hold

that resolution of the question depended upon local law, that the mortgage provision relied upon by the Government was unenforceable under Minnesota law, and to hold that "even though the Defendant is in some default, the Plaintiff is not entitled to a receiver."

The Government concedes that under Minnesota law the mortgage provision would be unenforceable. Thus, it becomes apparent that the issue before us is whether federal or state law controls the enforceability of the agreement providing for the appointment of a receiver to collect rents during the pendency of the foregoing proceedings.

Initially, we look to federal law to ascertain the source of the law controlling the relation between the United States and the parties to the mortgage. *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366-367 (1943); *United States v. Allegheny County*, 322 U.S. 174, 183 (1944); *United States v. Kramel*, 8 Cir., 234 F. 2d 577, 580 (1956); *United States v. View Crest Garden Apts., Inc.*, 9 Cir. 268 F. 2d 380, 382 (1959), cert. denied, 361 U.S. 884 (1959). Thus, if Minnesota law is to be applied in the matter of appointing a receiver in this foreclosure proceeding, it is because Congress or the federal courts have adopted local law in the furtherance of federal policy and not because of the force of the Minnesota law itself. As enunciated in the cases, supra, inasmuch as this action arises under federal law, and jurisdiction does not depend upon diversity of citizenship, the rule of *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), is inapplicable. However, state law is sometimes adopted to fulfill the federal policies involved. *Clearfield Trust Co. v. United States*, supra, 318 U.S. at 367.

In refusing to appoint a receiver, the trial court was motivated by our decision in *United States v. Kramel*, supra,

234 F. 2d 577, and held that the teachings of that case required the application of state law here. Because of vital factual differences, we conclude *Kramel* is not controlling. *Kramel* was an action for alleged conversion resulting from sale by a livestock commission company of an animal on which the Farmers Home Administration held a lien under a chattel mortgage. The case turned upon the efficacy of the lien as to a public livestock dealer who had no actual notice of the existence of the chattel mortgage. Thus, the key issue centered upon control of title to property—"a field of control which has always been regarded as peculiarly belonging to the States exclusively." 234 F. 2d at 582-583. Here, the appointment of a receiver during the pendency of the foreclosure action does not affect the title to the premises—such action does not go to the validity of the lien of the mortgage, but rather, it is a part and parcel of the remedy which arises only in default of the loan.

Although a contention urged by the Government in *Kramel* was focused upon the enforcement of rights of the Government under laws made on a nation-wide basis and in that regard *Kramel* is akin to the instant situation, nevertheless, as we recognized in *United States v. McCabe Company*, 8 Cir., 261 F. 2d 539, 544 (1958), which involved another federal program, "Kramel does not hold that under all circumstances federal rights must be determined upon the basis of state law."

The precise question presented herein was the subject of litigation in *United States v. View Crest Garden Apts., Inc.*, supra, 268 F. 2d 380. There, like here, the district court held that state law [Washington] applied and that under such law appointment of a receiver was not warranted. The court of appeals reasoned that federal law controlled, and reversed

and remanded for determination whether under federal law the facts warranted the appointment of a receiver.

No beneficial purpose will be served in re-enunciating the compelling reasons for holding, as did the Ninth Circuit, that federal law must be applied. What was said in that regard in *View Crest*, supra, 268 F. 2d 380, is applicable here. As we recognized in *McCabe*, supra, 261 F. 2d 539, the Supreme Court has consistently held that when the Government, acting pursuant to constitutional acts of Congress, enters into large scale transactions requiring uniform administration, "questions of rights and liabilities must be uniformly determined by federal law." 261 F. 2d at 543, citing *United States v. Standard Oil Company*, 332 U.S. 301 (1947); *United States v. Allegheny County*, supra, 322 U.S. 174; *Clearfield Trust Co. v. United States*, supra, 318 U.S. 363.

Additionally, it appears that two district courts in this circuit have recognized that federal law is to be applied in the appointment of a receiver and the disposition of funds by the receiver. *American National Insurance Company v. Smith*, N.D. Iowa, 197 F. Supp. 479 (1961) (Judge Graven); *United States v. Academy Apts, Inc.*, unreported, D. Minn., No. 580 Civil (Oct. 22, 1963) (Judge Nordbye). For cases which considered related questions, see also, *United States v. Sylacauga Properties, Inc.*, 5 Cir., 323 F. 2d 487, 491 (1963); *United States v. Heltz*, 6 Cir., 314 F. 2d 301, 303 (1963); *Pesaguarnano v. Allen Corporation*, 1 Cir., 267 F. 2d 550, 558 (1959); *American Houses, Inc. v. Schneider*, 3 Cir., 211 F. 2d 881, 882-883 (1954).

Encompassed within its second point, the Government urges that "this Court should remand the case to the district court with directions to appoint a receiver forthwith." This request is premised upon the Government's assertion that a

uniform federal rule is required where, as here, the Government—to protect its interest in a national program—seeks appointment of a receiver pursuant to the express terms of a mortgage, and that under such a rule—which has been promulgated—the Government is entitled as a matter of right to appointment of a receiver during the pendency of the foreclosure litigation. More precisely, the Government contends that once we have decided that federal law is controlling, our task is limited to enforcing the express terms of the mortgage agreement and that the enforceability of the provision for the appointment of a reciver is not dependent upon a showing of insufficiency of security or insolvency of the mortgagor. In so contending, the Government relies primarily upon two Ninth Circuit cases—*View Crest Garden Apartments, Inc. v. United States*, 281 F. 2d 844 (1960), cert. denied, 364 U.S. 902 (1960), and *United States v. Queen's Court Apartments, Inc.*, 296 F. 2d 534 (1961)—both of which had also been before the Ninth Circuit in prior instances. See, respectively, supra, 268 F. 2d 380; and 288 F. 2d 253 (1961).

In opposition, appellee maintains that in *View Crest*, supra, 281 F. 2d 844, the Ninth Circuit based its decision upon the district court's finding as to insolvency and insecurity, determined that as a matter of federal law *the facts of that case* warranted appointment of a receiver, but by no means held that the Government was entitled to the appointment of a receiver as a matter of right under the terms of the mortgage. As to the second *Queen's Court* opinion, supra, 296 F. 2d 534, appellee asserts that "although it is true that there is no mention of the inadequecy of security, insolvency of the mortgagor, disrepair of the buildings, and unoccupancy of the buildings, it cannot be doubted that the same factors

which led the Circuit Court to appoint a receiver [in the first *Queen's Court* case, supra 288 F. 2d 253] pending the appeal were present and dictated the appointment of a receiver pending foreclosure."

In its reply brief, the Government vigorously opposes appellee's interpretation of the *Queen's Court* cases, discounting the relevancy of the findings in the first *Queen's Court* case on the basis that "the receivership requested and granted in that preliminary proceeding was merely a temporary one" pending appeal, and did not involve the pendency of foreclosure proceedings. The Government contends that the second *Queen's Court* case is more akin to the case before us, and notes that there, "the Ninth Circuit neither made findings regarding the current adequacy of the mortgage security or the current financial status of the mortgagor, nor directed the district court to do so before appointing a receiver."

We need not here decide whether the second *Queen's Court* holding stands for the proposition that under federal law the Government is entitled — in all instances — to the appointment of a receiver according to the terms of the mortgage provision as a matter of right, without need for further findings. Nor, need we establish an iron-clad rule demanding, ipso facto without additional determination, appointment of a receiver pursuant to a mortgage provision such as the one before us. However, taking cognizance of the entire record and the factual background, including the circumstance that in the past the Federal Housing Commissioner, to protect the interest of the Government, assumed temporary control and management of the mortgaged premises, and including the admission that appellee has failed to make payments on the mortgage since July 1, 1963, we do hold that here the

Government is entitled to have a receiver appointed during the pendency of the foreclosure proceeding.[1]

Accordingly, we reverse and remand to the district court with directions to appoint a receiver forthwith, "with power to collect the rents, issues and profits of said mortgaged premises, due and becoming due during the pendency of such foreclosure suit" in accordance with the mortgage agreement, to pay the necessary expenses therefrom, and to otherwise make disbursements, all under the orders and supervision of the district court.

Mandate to be issued forthwith.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

---

[1] In oral argument counsel for appellee advised that appellee has not made monthly payments on the loan of approximately $6,700 each, since July, 1963, although, according to counsel, appellee has been collecting approximately $8,000 per month as rents. It appears from counsel's statement that a dispute exists in regard to application of amounts held in reserve to amounts due on the loan. In any event, implicit in the district court's order denying appointment of a receiver is the finding that appellee is in default.

APPENDIX C

[JUDGMENT]

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1963

No. 17630

UNITED STATES OF AMERICA, *Appellant*,

vs.

CHESTER PARK APARTMENTS, INC.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

This cause came on to be heard on the record from the United States District Court for the District of Minnesota, and on the motion of appellant for interim relief, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the Order of the said District Court of March 20, 1964, denying appointment of a receiver, in this cause, be, and the same is hereby, reversed without cost to either party in this Court.

It is further ordered and adjudged by this Court that this cause be and the same is hereby remanded to the said District Court with directions to appoint a receiver forthwith, "with power to collect the rents, issues and profits of said mortgaged

premises, due and becoming due during the pendency of such foreclosure suit" in accordance with the mortgage agreement, to pay the necessary expenses therefrom, and to otherwise make disbursements, all under the orders and supervision of the District Court.

And it is further ordered by this Court that the mandate in this cause issue forthwith to the said District Court.

May 28, 1964

APPENDIX D

IN THE
UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Civil Action No. 3-63-341

UNITED STATES OF AMERICA, *Plaintiff,*
vs.
CHESTER PARK APARTMENTS, INC., *Defendant.*

AFFIDAVIT

State of Minnesota
County of Ramsey—ss.

D. D. Wozniak and Frank Hammond, being duly sworn, state as follows:

1. This affidavit is made in connection with a motion for the appointment of a receiver in the above entitled matter.

2. They are attorneys representing defendant, Chester Park Apartments, Inc.

3. Motion for the appointment of receiver was served on D. D. Wozniak on December 17, 1963.

4. Said D. D. Wozniak then asked affiant Hammond to participate with him in the immediate preparation of an answer and response to the motion. Affiant Hammond was engaged in legal matters out of the city until December 20.

5. The motion recites that the defendant is in default of answer. No such default in fact exists. See the letter of December 9, 1963, addressed to Mr. Patrick Foley, attached hereto as Exhibit 1, reciting an extension for time to answer.

6. In previous actions of this kind plaintiff has represented that the interest of the plaintiff is the interest of the Government of the United States and that, by implication, different rules apply to it than to ordinary litigants. In fact, plaintiff's only function at the outset was as insurer of an ordinary real estate mortgage on Minnesota real estate. As such insurer, it is entitled to no different treatment than any other private party engaged in the insurance business. That such is the official position taken from time to time by plaintiff, when it suits his purpose, is illustrated by letter, copy of which is attached as Exhibit H, relating to Sibley Manor, Inc., which was the subject of a similar action in Civil Action File No. 3-62-162. Attention is called to the characterization in said letter of the Federal Housing Administration as a "financial institution."

7. As pointed out in the answer on file herein, taxes are not in default but payment thereof awaits an abatement proceeding in Ramsey County, Minnesota.

8. Fire and extended coverage insurance is in full force and effect.

9. No waste is being committed on the property.

10. Under the National Housing Act, the Federal Housing Administration insures mortgages for all types of buildings. A premium of ½ of 1% is charged for such insurance. Such premiums are used as an insurance reserve for foreclosures. Records which affiants do not presently have but which can be produced at time of trial will show that there is a great net profit to FHA each year resulting from such insurance operations. Analysis of the facts, law and financial status demonstrate that the federal government is in fact engaged in the insurance business. It is not engaged in the construction, operation or management of such buildings.

Neither is it engaged in business as a mortgagee. A claim against such insurance fund provides no basis in law or in fact for disregarding the settled law of mortgages.

11. The complaint and the motion for the appointment of a receiver contain an assertion that the property in question has a fair market value of less than the outstanding indebtedness. Affiants are informed and state on information and belief that such is not the fact and that the value of the property is in excess of the encumbrances; that plaintiff will not in any event suffer damage from the failure of the appointment of a receiver.

12. Various efforts have been made by defendant to negotiate a settlement of this problem with the plaintiff, and extended discussions have been had looking in that direction. Defendant's officers have been advised that since the commencement of this action all such negotiations must be conducted with the office of the United States attorney. (See Exhibit III attached hereto.) Plaintiff's attorney, Mr. Patrick Foley, and defendant's attorney D. D. Wozniak have both been engaged in trial almost continuously since the commencement of the action so that no such negotiations have been possible.

13. Appointment of a receiver would embarrass the conduct of settlement negotiations.

14. It is the earnest desire of the officers and holders of common shares of defendant corporation to negotiate a suitable settlement of the matter, even if it requires investment of additional funds in the corporation by such shareholders. Such settlement would be in the best interests of plaintiff as well as defendant but can only be conducted with the greatest difficulty if a receiver were appointed.

15. There is a genuine controversy as to the existence of a default by virtue of the reserve for replacement as al-

leged in the answer. Until it has been determined that there is in fact a default, no motion for the appointment of a receiver is appropriate.

D. D. WOZNIAK
FRANK HAMMOND

Subscribed and sworn to before me this 20th day of December, 1963. — Notary Public, Ramsey County, Minn. My commission expires Oct. 31, 1967. (N.S.)

Exhibit I

December 9, 1963

Mr. Patrick Foley
Assistant U. S. Attorney
United States Court House
Minneapolis, Minnesota

Re: United States vs. Chester Park Apartments, Inc.

Dear Mr. Foley:

Pursuant to our conversation, you have graciously consented to an extension of time for answer in the above entitled matter.

I have had a preliminary discussion with my clients and I hope to have the Answer to you sometime next week.

I should like to state, however, that my clients are desirous of retaining ownership of this property and further desire to renegotiate the mortgage. It appears that the government did step in and operate this apartment for approximately two years during which time the government was unable to pay the existing obligations with current income.

We believe that if the mortgage is recast and the payments represent a more realistic approach to the income, this would be beneficial to the government.

I would appreciate your inquiring of the FHA as to the feasibility of said negotiation.

Thank you for your anticipated courtesy in this matter.

Yours very truly,

dcw:ghm D. D. WOZNIAK

Exhibit II

FEDERAL HOUSING ADMINISTRATION
WASHINGTON, 25, D. C.

Legal Division .
Please refer to RHL-F6 February 26, 1960
Bouthilet, Daubney & Swenson
1100 Pioneer Building
St. Paul 1, Minnesota

Attention: Mr. John C. Bouthilet
Re: Project No. 092-42153 CHM
Sibley Manor, Inc.
St. Paul, Minnesota

Gentlemen:

Reference is made to your letter of February 5, 1960, directed to Mr. Marsh Cunningham.

Obviously, the assignment of your client's mortgage to the Federal Housing Commissioner is not open to question by the mortgagor. Mortgages are proper subjects of purchase and sale between financial institutions in the ordinary course of business, and the instant mortgage is no exception.

Our Comptroller informs us that you have been billed in an amount which includes an accrual for taxes on the basis

of past assessments. Pending your submission of appropriate evidence from tax officials reciting reduced tax liability, the accrual rate will remain unchanged.

Your letter indicates there is a possibility that the mortgage may be brought current. We assume that our Comptroller's billings afford you adequate information as to the sum required for that purpose.

Very truly yours,
WARREN E. COX
Chief Counsel
Rental Housing Section
Legal Division
By M. M. SHOUSE
Assistant Chief Counsel

Exhibit III

December 10, 1963

Mr. Patrick Foley
Assistant U. S. Attorney
U. S. Court House
Minneapolis, Minnesota

Re: Chester Park Apartments, Inc.

Dear Mr. Foley:

I had a long discussion with Mr. Gabler today concerning the operation and past history of the Chester Park Apartments. I advised Mr. Gabler of my clients' interest in attempting to work out a payment schedule that would be beneficial to the government and would also serve to save the property for the corporation and also, eventually, to save the

many thousands of dollars of money which has been personally expended by the chief stockholder, Mr. Chester Tobin.

Mr. Gabler informs me that any negotiation of this kind must be initiated with you since once the matter is in your hands he is not allowed to interfere with this procedure.

I know that you are busily engaged in trial, as I am. It is my hope that I will finish the Butler case at St. Cloud on Thursday, December 19. Also, I am going overseas for a brief period of time after Christmas.

At any rate, when you get a chance please give me a call to see how our respective schedules can be worked out.

Thank you sincerely for your anticipated courtesy in this matter.

Yours very truly,

ddw:ghm

D. D. WOZNIAK

APPENDIX E

Statutes

12 U.S.C. §1736(a):

> The term "mortgage" means a first mortgage on real estate, in fee simple * * * and the term "first mortgage" means such classes of first liens as are commonly given to secure advances on, or the unpaid purchase price of, real estate, under the laws of the State in which the real estate is located. * * *

Minnesota Statutes Annotated §559.17:

> A mortgage of real property is not to be deemed a conveyance, so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure.

Regulations

1949 Edition, Code of Federal Regulations, §280.18:

> The mortgage must contain a provision or provisions satisfactory to the Commissioner, giving to the mortgagee, in the event of default or foreclosure of the mortgage, such rights and remedies for the protection and preservation of the property covered by the mortgage and the income therefrom, *as are available under the law or custom of the jurisdiction.* (Emphasis supplied.)

1949 Edition, Code of Federal Regulations, §282.2(c):

> The term "mortgage" means such first lien upon real estate and other property as is commonly given to secure advances (including but not being limited to advances during construction) on, or the unpaid purchase price of, real estate *under the laws of the State, District or*

Territory in which the real estate is located, together with the credit instrument or instruments, if any, secured thereby. (Emphasis supplied.)

1949 Edition, Code of Federal Regulations, §282.8(b):

If the mortgagor fails to make any payment to the mortgagee required by the mortgage, or to perform any other covenant or obligation under the mortgage, and such failure continues for the period of grace, if any, set forth in the mortgage, the mortgage shall be considered in default, and the mortgagee, within a period of thirty (30) days after the occurrence of a default arising on account of such failure to make any such payment or within such period after the mortgagee shall have knowledge of the occurrence of a default arising on account of such failure to perform any other covenant or obligation under the mortgage, shall give notice in writing to the Commissioner of such default. At any time within a period of ninety (90) days after the date of such notice or within such later time as may be agreed upon by the Commissioner in writing, the mortgagee, at its election, shall either:

(1) With, and subject to, the consent of the Commissioner, acquire by means other than foreclosure of the mortgage, possession of, and title to, the mortgaged property; or

(2) Institute proceedings for the foreclosure of the mortgage and obtain possession of the mortgaged property and the income therefrom through the voluntary surrender thereof by the mortgagor or institute, and prosecute with reasonable diligence, *proceedings for the appointments of a receiver of the mortgaged property and the income therefrom* or proceed to exercise such other rights and remedies as may be available to it for the protection and preservation of the mortgaged property and the income therefrom *under the mortgage and the law of the particular jurisdiction*: *Provided, That*

if the laws of the State in which the mortgaged property is situated do not permit the institution of such proceedings within such period of time, the mortgagee shall institute such proceedings within sixty (60) days after the expiration of the time during which the institution of such proceedings is prohibited by such laws. Nothing contained in this subsection shall be so construed as to require the mortgagee to take any action when the necessity therefor has been waived in writing by the Commissioner nor to prevent the mortgagee from taking action at a later date than herein specified provided the Commissioner so agrees in writing. The mortgagee shall promptly give notice in writing to the Commissioner of the institution of foreclosure proceedings under this subsection and shall exercise reasonable diligence in prosecuting such proceedings to completion. If after default and prior to the completion of foreclosure proceedings the mortgagor shall pay to the mortgagee all payments in default and such expenses as the mortgagee shall have incurred in connection with the foreclosure proceedings, notice thereof shall be given to the Commissioner by the mortgagee, and the insurance shall continue as if such default had not occurred. (Emphasis added.)